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Land Release Liability

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EDITORIAL

Land Release Liability

Who should be responsible for any adverse events after clearance? The process of transferring liability from an operator to the state seems biased due to an inherent conflict of interest.

by Sean Moorhouse [Mine Action Consulting]

If a mine/explosive remnant of war (ERW) accident occurs in previously released land, who is liable for the damage caused? This is a question that many national mine action authorities (NMAA) ask and one that I was asked in Laos and Bosnia-Herzegovina during two recent workshops on liability in mine action, which were facilitated by the Geneva International Centre on Humanitarian Demining (GICHD)

The International Mine Action Standards (IMAS) guide mine action organizations by establishing principles and specifying international requirements in mine action. IMAS 07.11, Amendment No. 2, released 1 March 2013, contains important elements that help point the way toward answering questions on liability. Moreover, the amendment raises a few additional questions of its own, which require answers if IMAS is to be thoroughly implemented.

Land Release Clarification

Known for being difficult to translate into languages other than English, the term land release has become problematic over the years. In addition, although most people in the mine action community have a good understanding of land release, many continue to conflate land release (land determined as being safe to use) with land cancellation (land never contaminated). Combining the two concepts into one can cause confusion.

Land release—an evidence-based threat assessment determining where full clearance is or is not required—is only concerned with increasing the efficiency of mine action activities. Like anything in the dynamic world of mine action, land release is subject to constant refinements, which explains why the latest IMAS 07.11 came into being.

The new IMAS 07.11 describes land release as "… an evidence-based decision-making process that helps determine with confidence which land needs further action and which does not. It involves the identification of hazardous areas, the cancellation of land through non-technical survey, the reduction of land through technical survey and the clearance of land with actual mine/ERW contamination."[1]

This 13-year-old Sri Lankan boy lost his foot while working in his family's garden after the area was partially cleared.
All photos courtesy of the author.

What happens when released land is found to contain an unexploded device or an explosion occurs? IMAS 07.11 uses the term adverse event to describe such incidents. Unfortunately, these adverse events will occur from time to time. Although perfection is the goal, it cannot always be achieved; some mines/ERW might be missed during the clearance process.

IMAS 07.11 contains three key elements that determine liability in the event that any adverse event occurs:

- Reasonable effort
- Residual risk
- Transfer of liability from operator to state

IMAS 07.11 describes all reasonable effort as "… a minimum acceptable level of effort to identify and document contaminated areas or to remove the presence or suspicion of mines/ERW. 'All reasonable effort' has been applied when the com-

mitment of additional resources is considered to be unreasonable in relation to the results expected."[1]

NMAA should define what actions and parameters make up all reasonable effort for the different processes concerned. For example, in areas where clearance is deemed necessary, national standards determine a minimum clearance depth and target size for clearance. For metal detectors, the target size is determined as the smallest piece of metal the detector must be able to find, to represent the signal of the mines/ERW being cleared. For animal detection systems, it is the smallest explosive trace.

The second element, residual risk, is unavoidable. A residual risk of encountering mines/ERW in any post-conflict country will always exist, yet with every item found and destroyed, risk is reduced (albeit not entirely eliminated). Even in manually cleared areas, using all reasonable—or even unreasonable—effort, a chance always remains that an item was missed. Mine action's goal is to reduce that risk to a tolerably low level. Each NMAA must determine its own risk-tolerance level.

The third and final element is the transfer of liability from the operator to the state. IMAS defines liability as "… any legal responsibility, duty or obligation that a country, organisation or individual may have. Liability in relation to an adverse event, such as an accident or the discovery of a missed item in an area, is normally linked to non-compliance with an agreed policy or procedure."[1]

Transfer of Liability

IMAS 07.11 assumes the operator is liable for any damages that may occur during clearance—which, although understandable, seems a little unfair. After all, the operator was not responsible for placing mines/ERW in the area. Worse, if the clearance organization had not taken all of the physical risks involved in clearing the devices, it would have assumed no liability and the land would still be contaminated. Yet in deciding to clear the devices—whether for profit or humanitarian purposes—the operator effectively becomes liable for any damages caused during clearance.

IMAS clarifies that the operator is liable if an accident occurs during the operation, but at what point does the state assume liability? In areas with no evidence of contamination, land is released to the community without executing any technical survey or full clearance. The non-technical survey process is specified according to national standards, implemented by the operator and quality managed by NMAA. Is there any difference in the operator's liability if an adverse event occurs in an area released without being processed?[2]

A mine was found and marked in an area declared clear of mines in Sri Lanka.

When land is released, regardless of the method used, a formal handover process should take place where the operator relinquishes liability to NMAA, an agent of the state. Therefore, the responsibility should immediately transfer to the state when a formal handover process occurs. Additionally, liability handover should be a clearly and explicitly identified moment in time.

On the other hand, NMAA may wish to delay this handover for as long as possible, so that the operator retains liability. This delaying tactic should not be allowed, because if there are concerns about the quality of the work, NMAA would require that the operator solve the problems and certify the work's completion.

Holding an Operator Liable

However, IMAS 07.11 states that an operator will, at least in principle, retain some liability in cases of incidents caused by suspected missed mines/ERW in four circumstances. Specifically, some liability is retained if an investigation shows that

"i) the accident was caused by wilful or criminal misconduct, gross negligence, reckless misconduct or a conscious, flagrant indifference to the rights or safety of the individual(s) harmed;

ii) the organisation was not properly accredited, licensed, certified or authorised to carry out acts leading to the erroneous land release decision;

iii) the organisation wilfully infringed prevailing national policy or standards;

iv) the organisation had conducted gross procedural errors or grossly deviated from an agreed land release concept."[1]

Mines found after clearance create risks for local residents.

While these conditions on liability transfer make sense in theory, they do not in practice. Although IMAS 07.11 does not specify which organization would be responsible for conducting an investigation into any adverse event after land release, in practice, the relevant NMAA would be responsible. This creates an inherent conflict of interest, as NMAA is one of the parties that could be found at fault in any investigation. Therefore, it should not be investigating itself.

The State Must Accept Responsibility

A potential way around this conflict of interest would be to have a supranational body, perhaps the United Nations Mine Action Service or GICHD, that would be responsible for investigating adverse events worldwide. Currently, this is unlikely to happen. Until it does, the humanitarian mine action community is left with the uncomfortable status quo of NMAA determining whether it itself is liable or if that liability should be placed on the operator.

As to the original question: If there is a mine/ERW accident in previously released land, who should be liable for the damage caused? The answer is: The state should be liable prior to and after land release, because it owes a duty of care to its citizens and visitors. It is a conflict of interest to have a national mine action authority investigating an accident that could determine that the state it forms part of is liable. In the final analysis, I posit the state is liable both prior to land release and after land release.

See endnotes page 50

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